

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2011

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision

1. The complainant requested the briefing information provided by Treasury officials to the Chancellor of the Exchequer, George Osborne, in the first 24 hour period after his appointment as Chancellor on 12 May 2010.
2. The Information Commissioner's decision is that Her Majesty's Treasury (HMT) correctly withheld the information requested under section 35(1)(a) of the FOIA.

Request and response

3. On 22 June 2010, the complainant wrote to HMT and requested information in the following terms:
'I would like to receive the information/analysis/advice provided by Treasury officials to the new Chancellor in the first twenty four hour period after his appointment as Chancellor this year, covering Treasury's analysis of and advice on the national economic and government fiscal outlook and policy issues for the new government'
4. HMT responded on 20 July 2010. It stated that it held information within scope of the request, but it was withholding the information under section 35(1)(a) and section 27(1)(a).
5. On 25 August 2010 the complainant requested an internal review.
6. Following an internal review HMT wrote to the complainant on 24 December 2010. It stated that it was satisfied that the information had

been correctly withheld under the sections previously cited. HMT advised the complainant that the information was also being withheld under section 29(1)(a), section 29(1)(b) and section 43(2). Furthermore, a qualified person had determined that the information was exempt from disclosure under section 36(2)(b) and 36(2)(c).

Scope of the case

7. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled.
8. In a telephone discussion with the Commissioner on 14 April 2011, the complainant confirmed that he was particularly interested in information provided to the Chancellor as to what the pace of fiscal consolidation should be and the pace of associated economic measures.
9. Following a telephone discussion with the Commissioner on 15 April 2011, HMT agreed to carry out a further review of the withheld information to ascertain whether any of the information concerning fiscal consolidation could be disclosed. The Commissioner asked HMT to consider providing the complainant with a further response which was as informative and helpful as possible with regard to the type of information within scope that the complainant was particularly interested in obtaining.
10. HMT provided the complainant with the further response on 13 June 2011. The response directed the complainant to information already in the public domain by way of web links detailing statements and announcements made by the Coalition Government and the Chancellor concerning Treasury advice. HMT confirmed that it considered that the overriding public interest lay in protecting the detail of the withheld information and maintained reliance on the exemptions cited.
11. On 31 July 2011, the complainant provided the Commissioner with submissions supporting his case for disclosure of the withheld information.
12. The withheld information in this case consists of a briefing file which was part of HMT's initial advice to the new Chancellor.

Reasons for decision

13. In considering his decision, the Commissioner has taken account of all the arguments provided by both the complainant and the HMT, but has restricted his written analysis to those most relevant to his decision.

Exemptions

Section 35(1)(a)

14. Section 35(1)(a) states that information held by a government department is exempt information if it *'relates to the formulation or development of government policy'*. As this is a class based exemption if the information relates to the formulation or development of government policy it falls under this exemption.
15. The Commissioner must consider whether the withheld information relates to the formulation and development of government policy.
16. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question. It does not have to be information specifically on the formulation or development of that policy.
17. Formulation of policy can be described as the early stages of the policy process where options are generated, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. Development, on the other hand, will often go beyond this stage, and may include the processes involved in improving on or altering existing policy via piloting, monitoring, reviewing, analysing or recording the effects of existing policy. The Commissioner is satisfied that the information withheld from the complainant engages the exemption under section 35(1)(a) of the FOIA. The Commissioner considers this to be the case for the following reasons.
18. In its internal review decision HMT informed the complainant that, *'the information in question consists of advice to Ministers and concerns technical appraisals from Treasury officials and detailed advice on policy options and potential actions'*. Having seen the withheld information, the Commissioner agrees that it consists of initial HMT advice to an incoming Chancellor of the Exchequer which relates to economic and fiscal policy options, advice and suggestions set against the background of the challenges and demands presented by the global financial crisis and the state of the UK's finances. The Commissioner is therefore satisfied that the information in the briefing to the Chancellor falls within the description of section 35(1)(a) and that consequently the exemption is engaged.

Public interest test

19. Having found that section 35(1)(a) is engaged, the Commissioner is required, since the exemption is qualified and not absolute, to consider the balance of the public interest test. In making his assessment as to where the balance lies, the Commissioner can only consider the position as it was at the time at which the complainant made his request. Section 35(1)(a) can only be maintained where the public interest in doing so outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

20. The complainant advanced a number of factors as to why he considered that there were strong public interest arguments for the release of the withheld information.
21. In his request for internal review the complainant stated:

'the importance of Treasury advice was cited in the Coalition agreement. The government has given emphasis to greater transparency and accountability. This is noted in the letter from the Prime Minister and his deputy to government departments on 31 May 2010. This strongly suggests that transparency and accountability applies to the work of civil servants as well as ministers. Indeed, I consider that the release of expert impartial economic and fiscal analysis prepared by Treasury civil servants at that critical time can only contribute to better public understanding of the issues faced by the government and nation'.
22. In submissions to the Commissioner the complainant explained that, *'my argument is that for all intents and purposes the government has announced and taken steps to fully implement its fiscal policy'.* In support of this contention the complainant referenced the Chancellor's Budget Speech of 22 June 2010 in which the Chancellor announced that *'The formal mandate we set is that the structural current deficit should be in balance in the final year of the five-year forecast period, which is 2015-16 in this Budget'.*
23. The complainant went on to state that taxation measures consistent with achieving the Government's fiscal policy were announced in the Budget, and the subsequent Spending Review had announced spending limits by department for the period up to and including 2014-15. The complainant acknowledged that while numerous detailed decisions probably do remain to be undertaken at the departmental level, the broad parameters relating to the policy were set. Envisaging that the policy might be changed or refined to take account of changes in the macroeconomic situation, the complainant argued that any such changes would be a new policy, subject to new advice not covered by

his request. The complainant asserted that the information requested did not need to be protected for the purposes of future policy making.

24. The complainant further suggested that *'any debate that the release causes would probably contribute to better public understanding of the political economy of real world fiscal policy'*. More generally, he submitted that *'timely release of civil service advice should contribute to greater transparency and accountability of the government as a whole, including the civil service'*.
25. In correspondence with the complainant, HMT acknowledged and recognised the public interest attached to the information requested. In its initial response, HMT stated:

'In favour of disclosure we recognise the importance of transparency and accountability in government and to demonstrate that the FOI Act is working in releasing information that would not have been published before. We also recognise the wider public interest in the issues that were considered in the briefing as these relate to the UK economic and fiscal position'.

26. In its revised response to the complainant of 13 June 2011, HMT stated that it recognised that there is a high public interest in the release of economic advice to the Chancellor because of the current economic situation. It also recognised that public debate about the actions taken to address the deficit *'heightens the public interest in the release of information that will inform the debate'*.

However, HMT added that given that the Government had clearly stated its position, it did not consider that the disclosure of the advice to the Chancellor would give further clarity about the reasons for pursuing the policies adopted.

Public interest arguments in favour of maintaining the exemption

27. In its refusal notice to the complainant, HMT advanced a three-pronged argument for withholding the information. Firstly, HMT explained that the FOIA recognised the need for a 'private space' for officials to weigh up issues and advise ministers. HMT argued that if ministers and officials could not have confidence in this private policy space being protected *'then policy formulation would suffer from a lack of candour in exploring the options available and in assessing the strengths and weaknesses of different options'*.
28. Secondly, HMT stated that in relation to briefings for new Ministers, there is a need for Ministers to speedily get to grips with information they need to know in order to commence work on specific policies. It was therefore vital, and in the public interest, that in cases such as this the briefing for an incoming senior Minister is as detailed and accurate

as possible, employing a free and frank approach. HMT argued that *'if Ministerial briefings of this kind were to be disclosed, officials might be less candid, resulting in poorer quality briefing and potentially, less well-informed decisions, which would not be in the public interest'*.

29. Thirdly, HMT cited the importance in Civil Servants being able to form good working relationships with incoming Ministers whenever there is a change of government, so that trust could be built up quickly. This was important for the effective conduct of public affairs. HMT stated that this process would be damaged by the disclosure of material such as the briefing, and *'the fact that the information is so recent, and that much of it relates to current economic and policy issues, increases the potential damage from disclosure'*.
30. The internal review carried out within a different directorate of HMT to that which had produced the original response, re-enforced the above public interest arguments. It went on to state:

'in addition to these arguments, there is a strong public interest in ensuring that policy formulation and development under a new government is effective. The FOI Act and the Information Commissioner recognise the need for private 'space' to allow ministers and officials to conduct rigorous and candid assessments of their policies, without the threat of there being premature disclosure'.
31. The review noted that the information in question *'does not exist in a time vacuum, but is linked and relevant to more recent work'*. In this context, HMT argued that premature disclosure would also harm the effective delivery of the decisions the Government makes and announces, diverting attention and efforts from policy implementation towards how individual decisions were made. HMT asserted that *'releasing such information now would hamper the Government's ability to present its case in relation to decisions already made, and could undermine public confidence in ongoing discussions with other countries likely to be affected by the release of this information'*.
32. In its revised response to the complainant of 13 June 2011, HMT elaborated further on its primary public interest arguments for withholding the requested information. It emphasised that *'a key factor' in making a judgement on disclosure is the extent to which the advice forms part of the ongoing formulation and implementation of the Government's policy. HMT argued that, as the Government is one year into delivering its 5-year fiscal consolidation plan, 'releasing advice on the fiscal judgement, against the background of continuing global and domestic uncertainties, could undermine the implementation of policy and jeopardise the achievement of its objectives'*. Consequently, HMT contended that in this case *'there is clearly a very strong public interest in protecting information'*.

33. Importantly, HMT made clear, as it had done in its internal review decision, that it was not arguing that information in the briefing could never be released, rather that the case for withholding it was more compelling *'the closer we are to the events concerned'*. HMT were of the view that the information needs protection for a period of time and it considered that *'the time is too close to the preparation of the information'*.

Balance of the public interest arguments

34. In considering the balance of the public interest in this case, the Commissioner has taken into account the general public interest in transparency and openness in decision-making, as well as factors that apply to this specific information, including those advanced by both the complainant and HMT.
35. The complainant correctly contends that the public interest in transparency and accountability of ministerial decisions also applies to the work of departmental civil servants. The Commissioner agrees that the disclosure of expert impartial economic and fiscal analysis prepared by HMT civil servants at the time of the formation of the Coalition Government would contribute to better public understanding of the issues faced by the Government and the country.
36. Those issues, in terms of the economic and fiscal challenges facing the UK were set out in The Spending Review framework presented to Parliament in June 2010 by the current Chancellor. He stated that *'the Government is committed to carrying out Britain's unavoidable deficit reduction plan in a way that strengthens and unites the country. The Spending Review will be guided by the principles of freedom, fairness and responsibility, in order to demonstrate that we are all in this together'*¹. The far-reaching impact and effect of the Coalition Government's plans for economic and fiscal management were averred to by the Chancellor when he noted in the framework that *'reduced spending this year (2010) is only the first step on a long road towards restoring good management of Britain's public finances. Even tougher decisions will be required at the Spending Review'*².
37. The significant scope for social change that would follow the Government's plans for unprecedented cuts and austerity measures was indicated in the framework when the Chancellor confirmed that successfully reducing the deficit would mean *'consulting widely using all available talents to ensure that we deliver a stronger society as well as a*

¹ The Spending Review framework June 2010 (para 1.4)

² (para 1.8)

*smaller state*³. The Chancellor went on to note that *'the scale of the challenge presents an opportunity to take a more fundamental look at the role of government in society and how it can fulfil that role. The Review will therefore consider how to deliver a step change in public sector productivity and value for money*⁴'.

38. The Commissioner notes that one of the most controversial consequences of the Government's attempts to shrink the size of the state and deliver the step change within the public sector has been swingeing cuts across the public sector with few areas of service provision being unaffected. Such are the scale of the Government's unprecedented austerity measures that the lives of millions of people have been affected, and will continue to be affected, as a result of the economic and fiscal decisions and policies which are currently being implemented. The Commissioner recognises that those decisions and policies have had a very real impact on the lives of millions of people in terms of, for example, access to jobs, housing, welfare and service provision.
39. The Commissioner also recognises that there is not political or common consensus with regard to the policies being pursued by the Coalition Government. Whilst there is general political agreement on the need to reduce the UK's structural deficit and the need for public sector cuts, there is disagreement as to the size and speed of the cuts being made, with the Labour opposition making the argument that the approach taken by the Government threatens to inhibit and stifle economic growth.
40. Against the background described above, the Commissioner considers that there is a very strong public interest in the public having sight of any HMT advice and analysis which may have had a bearing on the economic and fiscal policies being pursued. The more radical and far-reaching the consequences of political decisions, the greater the public interest need for transparency, scrutiny and accountability of the same. In addition, any information which would aid public understanding and awareness of the options available to the government of the day for responding to the financial crisis and the need for deficit reduction carries with it a significant public interest given the widespread impact upon the public as a whole.
41. The central thrust of HMT's case for maintaining the section 35(1)(a) exemption is the need for a 'private space' for officials to weigh up issues and advise ministers without the threat of premature disclosure

³ (para 1.10)

⁴ (para 2.2)

diverting attention and efforts from policy implementation towards how individual decisions were made.

42. The Commissioner recognises 'safe space' arguments, i.e. the need for government to have a safe space to formulate policy, debate 'live' issues and reach decisions without being hindered by external comment and/or media involvement. In *Department for Education and Skills v the Information Commissioner and The Evening Standard (EA/2006/0006)*, the Tribunal emphasised the importance of such arguments, stating:

'Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'.

43. Safe space arguments exist separate to, and regardless of, any potential effect on the frankness and candour of policy debate that might result from disclosure of information under the Act; the so-called 'chilling effect'. The Commissioner notes that HMT has relied on both public interest arguments in their responses to the complainant. Whilst the Commissioner would not entirely discount the relevance and application of the 'chilling effect' argument to the information in question, he would agree to some extent with the complainant's contention that concerns about the effects of disclosure upon the quality of subsequent information provision, analysis and advice can be over-stated. The Commissioner considers that the safe space arguments advanced by HMT have greater strength and weight to the nature and content of the withheld information in this case.
44. However, as the Tribunal has made clear⁵, and as the Commissioner accepts, there may be cases where the public interest in disclosure is sufficient to outweigh the important safe space consideration. There are two determining factors which are crucial in ascertaining where the public interest balance lies, these being the timing of the request, and whether the formulation and development of policy has been completed.
45. With regard to the latter consideration, the Commissioner notes that in his request for an internal review, the complainant stated that, *'Economic and fiscal policy has been developed, formulated, announced and is in the process of being implemented'*. In making this observation, the complainant appeared to recognise that the policy in question was in the *process* of implementation. Yet in his submissions to the Commissioner of 31 July 2011, the complainant went some way further in asserting that his argument *'is that for all intents and*

⁵ *Scotland Office v the Information Commissioner (EA/2007/0128)*

purposes the government has announced and taken steps to fully implement its fiscal policy'.

46. Whilst the Commissioner would agree with the complainant that *'the broad parameters relating to fiscal consolidation policy are set'*, he does not agree with the assertion that the Government's fiscal policy has been 'fully' implemented. At the time of the complainant's request in June 2010, the Chancellor had presented The Spending Review framework, and his emergency Budget, but the details of The Spending Review (i.e. where the cuts were being implemented across government departments) had yet to be announced. Even a year later, at the time that HMT provided the complainant with its revised response, the Government was (as the Treasury explained) only one year into delivering its five year consolidation plan.
47. In his request for an internal review, the complainant explained that *'my request tried to focus on strategic analysis and advice, the advice that I thought likely to be provided initially, rather than the more detailed work that probably would follow later'*. The Commissioner appreciates the distinction that the complainant has attempted to draw, but does not consider that the strategic analysis and advice provided to the Chancellor in HMT's briefing can be easily or realistically separated from the policy formulation and development stemming from such information.
48. The Commissioner would agree that in light of the current uncertainty in the global financial markets, and factors such as the Eurozone sovereign debt crisis, it is likely that the Government's economic and fiscal policy may, as the complainant recognises, be subject to change or refinement. However, the Commissioner does not agree with the complainant's contention that any such policy amendment would necessarily be 'a new policy' and thus completely separate from the information covered by his request. It is often difficult to determine the point at which formulation and development of policy ends and implementation of policy begins. However, in this instance, it is clear from information already placed in the public domain by the Government, that the full implementation of the aforementioned policy has yet to take effect (as evidenced by the fact that the fiscal consolidation plan is spread over 5 years).
49. The second and, in the Commissioner's view, the most important determining factor in this case is the timing of the request. The complainant's request for the information was made in June 2010, less than one month after HMT provided the incoming Chancellor with its briefing file. As the Tribunal noted in *DBERR v the Information Commissioner and Friends of the Earth (EA/2007/0072)*, the public interest in a safe space is strongest at the early stages of policy formulation and development, with the weight of this interest

diminishing over time as policy becomes more certain and policy decisions are made public.

50. The Commissioner recognises that the contents of HMT's initial briefing and advice to the Chancellor will be of considerable interest to the public, particularly given the controversial decisions the Coalition Government has since taken with regard to economic and fiscal policy primarily regarding public spending. The Government has maintained that 'there is no alternative' to the path being taken if the UK is to avoid the economic disaster that has befallen Greece, Ireland and which currently threatens other countries within the Eurozone. There is a clear and important public interest in the disclosure of any information which would assist the public in deciding for themselves whether there was any alternative to the austerity measures which were swiftly brought into effect by the incoming Government. As HMT has noted, *'public debate about the actions taken to address the deficit heightens the public interest in the release of information that will inform the debate'*.
51. Indeed, the strong public interest in the release of economic advice to the Chancellor in such circumstances, has been recognised by HMT and the Commissioner is mindful of the fact that HMT is not arguing that the information in question could never be released, only that the information needs protection for a period of time.
52. In reaching his decision in this case, the Commissioner has been mindful of the important distinction between information which would be of interest to the public and information which it is in the public interest to disclose. The Commissioner has detailed the important public interest factors which favour disclosure of the information in this case and these should not be underestimated or understated.
53. Yet the Commissioner cannot ignore the adverse public interest consequences and problems which would inevitably result from premature disclosure of the information in question. The Commissioner considers that the disclosure of detailed advice on policy options and potential actions presented to the Chancellor by HMT at the time of the request would have attracted considerable media and political attention and would have led to the Government having to defend and justify not only the decisions which it had taken, but also those policy options and suggestions not chosen or rejected. Such rigorous accountability and opportunity for public scrutiny is essential of course, especially in this case, where the information relates to matters of such massive public concern and impact.
54. However, the Commissioner considers that it would not be in the public interest for the Government to be distracted and deflected from focusing on its decided economic and fiscal policy at a time when that policy is still in the process of being implemented and when there remains a

pressing need to create confidence in the financial markets and to ensure that the UK emerges from the global downturn as quickly as possible. In this respect the Commissioner does not agree with the complainant's suggestion that the Government would merely have '*a modest political problem*' in explaining away any differences which may exist between its chosen policies and the advice provided by HMT officials. On the contrary, any such differences would be understandably seized upon and given considerable prominence, undue or otherwise, given the continuing national and increasingly contentious debate that dominated the run up to the General Election of 2010 and which formed the background to this request.

55. In weighing the respective public interest factors applicable in this case, the Commissioner is satisfied that the public interest lies in favour of maintaining the section 35(1)(a) exemption. He considers that the premature disclosure of information relating to live and continuing policy implementation, whilst being of undoubted interest to the public, would not have been in the primary public interest in June 2010, in that it would have deprived the Government of the safe space needed to focus upon the overwhelming public interest of meeting the demanding and pressing economical and fiscal challenges facing the UK. Those challenges have not abated at the time of this decision, and the Commissioner is of the view that the safe space remains essential at the present time, whilst the Government continues to implement its economic and fiscal policies and responds to related world events.
56. In reaching this determination of the public interest balance, the Commissioner has taken account of the fact that, as HMT have pointed out, significant information as regards the Government's economic and fiscal policy is already in the public domain, and that the public interest in scrutinising the reasons for Ministerial decisions on fiscal consolidation is met to some degree by the fact that Ministers are answerable to Parliament for their decisions.
57. This having been said, the Commissioner would emphasise that with the passage of time, he would expect, as HMT have acknowledged, that the public interest factors in favour of maintaining the section 35(1)(a) exemption and the need for the safe space in particular, would diminish sufficiently so as to enable disclosure of the information in order to satisfy the strong public interest (primarily transparency and accountability) elements which the information carries.
58. The engagement of section 35 by HMT meant that the Commissioner was barred by the provisions of the FOIA from considering section 36. As the Commissioner has found the information to be exempt from disclosure by virtue of section 35(1)(a), he is not required to consider the other exemptions relied upon by HMT, specifically section 27 (prejudice to international relations) and section 29 (prejudice to the

economy). However, he would note in passing that much of the information contained in the briefing file would have been exempt from disclosure under either exemption.

Other matters

59. The Commissioner commends HMT for the detailed and helpful nature of its responses to the complainant's request, particularly the further and revised response of 13 June 2011. Such responses accord with good FOIA practice and the duty to provide advice and assistance under section 16(1) of the FOIA. Similarly, the Commissioner is grateful for the detailed submissions provided to him by the complainant on 31 July 2011.

Right of appeal

60. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

61. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Graham Smith
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